

A Yee Chow Fah v Multihorizon Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R3-11-21 OF 1998
NIK HASHIM J
20 NOVEMBER 1998

B *Banking* — *Cheque* — *Dishonoured cheque* — *Holder in due course* — *Countermand of cheque does not affect liability of drawer towards holder of cheque* — *Whether holder held cheque free from defect of title of prior parties* — *Whether holder of cash cheque may enforce payment against drawer of cheque which had been countermanded* — *Bills of Exchange Act 1949 s 38*

C The respondent drew a crossed post-dated cheque made payable to cash or bearer and delivered the cheque to Cipta Hikmat Development Sdn Bhd ('Cipta Hikmat'). Subsequently, the respondent countermanded the payment. The cheque then fell into the hands of one Yee Teck Fah who negotiated the cheque with the appellant and obtained cash from her in return for the cheque. The appellant presented the cheque for payment and it was dishonoured, having been countermanded by the respondent. The appellant brought an action against the respondent on the dishonoured cheque. The magistrate rejected the claim on the ground that there was no privity of contract between the parties, and no consideration received from the plaintiff. The appellant appealed. Counsel for the appellant argued that the appellant was the holder of the cheque and had given good consideration for the cheque by giving cash to Yee Teck Fah in return for the cheque. The issue was whether a holder of a cash cheque who is not an immediate party to the cheque may enforce payment against the drawer of the cheque which has been countermanded.

F **Held**, allowing the appeal:

G (1) The countermand of a cheque by a drawer only affects the relationship between the drawer and his banker, namely it terminates the authority of the banker to make payment on the cheque. A countermand, however, does not in any way affect the liability of the drawer towards a holder of the cheque (see p 178G-H).

(2) In the absence of any allegation of fraud or illegality being committed in respect of the cheque, the court must presume that the appellant was the holder in due course who took the cheque complete and regular on the face of it (see p 179B).

H (3) The appellant became the holder of the cheque before it was overdue and without notice of the countermand. There was no evidence that at the time the cheque was negotiated to her, she had any notice of any defect in the title of Yee Teck Fah. Thus, in the absence of such notice, the appellant must have taken the cheque in good faith and for value (see p 179D).

I (4) Since the cheque was dishonoured by payment, the immediate recourse against the drawer of the cheque, namely the respondent, accrues to the appellant, the holder. By virtue of s 38 of the Bills

of Exchange Act 1949, the appellant, being a holder in due course, even though she was the fourth party, holds the cheque free from any defect of title of prior parties, as well as from mere personal defences available to the prior parties among themselves, provided that the holder obtains it in good faith without any notice of its defects. Accordingly therefore, the appellant was entitled to sue the respondent in her own name (see p 179E–G).

[Bahasa Malaysia summary]

Responden telah mengeluarkan cek berpalang yang bertarikh masa hadapan yang patut dibayar kepada pembawa dan telah menghantar cek tersebut kepada Cipta Hikmat Development Sdn Bhd ('Cipta Hikmat'). Selepas itu, responden telah membatalkan pembayaran. Kemudian cek tersebut jatuh ke tangan Yee Teck Fah yang telah berurusan dengan cek tersebut dengan perayu dan telah mendapat tunai daripadanya sebagai balasan untuk cek tersebut. Perayu telah mengemukakan cek tersebut untuk pembayaran dan ia telah tidak dilayan, selepas dibatalkan oleh responden. Perayu telah membawa satu tindakan terhadap responden untuk cek tak layan tersebut. Majistret telah menolak tuntutan tersebut atas dasar bahawa tiada priviti kontrak antara pihak-pihak, dan tiada balasan diterima daripada plaintif. Perayu telah merayu. Peguam untuk perayu telah berhujah bahawa perayu adalah pemegang cek tersebut dan telah memberikan balasan yang baik untuk cek tersebut. Isu adalah sama ada seorang pemegang cek tunai yang bukan pihak yang secara terus kepada cek tersebut boleh menguatkuasakan pembayaran terhadap penyuruh bayar cek tersebut yang telah dibatalkan.

Diputuskan, membenarkan rayuan:

- (1) Pembatalan cek oleh penyuruh bayar hanya akan menjejaskan hubungan antara seorang penyuruh bayar dengan banknya, iaitu ia akan menamatkan kuasa bank tersebut untuk membuat pembayaran atas cek tersebut. Namun, suatu pembatalan tidak akan walau apa cara sekali pun menjejaskan liabiliti penyuruh bayar terhadap pemegang cek tersebut (lihat ms 178G–H).
- (2) Atas ketiadaan pengataan mengenai fraud atau penyalahan undang-undang yang telah dilakukan berkenaan dengan cek tersebut, mahkamah mestilah menganggap bahawa perayu adalah pemegang selanjutnya yang telah mengambil cek tersebut secara sempurna dan biasa di permukaannya (lihat ms 179B).
- (3) Perayu telah menjadi pemegang selanjut cek tersebut sebelum terlewat dan tanpa notis mengenai pembatalan tersebut. Tidak terdapat keterangan pada masa cek tersebut diuruskan kepadanya, beliau mempunyai notis mengenai sebarang kecacatan di dalam hak milik Yee Teck Fah. Oleh itu, di sebalik ketiadaan notis tersebut, perayu telah menerima cek tersebut dengan suci hati dan untuk balasan (lihat ms 179D).

- A** (4) Oleh kerana cek tersebut telah dibatalkan pembayarannya, tindakan segera terhadap penyuruh bayar, iaitu responden adalah terakru kepada perayu, pemegang tersebut. Melalui s 38 Akta Bil-Bil Pertukaran 1949, perayu, yang merupakan pemegang selanjutnya, walaupun dia adalah pihak yang keempat, memegang cek tersebut bebas daripada sebarang kecacatan hak milik
- B** pihak-pihak yang sebelumnya, dan juga pembelaan peribadi yang terbuka kepada pihak-pihak yang sebelumnya antara mereka, dengan syarat bahawa pemegang memilikinya dengan suci hati tanpa notis mengenai kecacatannya. Oleh itu, perayu adalah berhak untuk mendakwa responden di atas namanya sendiri (lihat ms 179E-G).]
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Notes

For cases on dishonoured cheque, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1411-1415.

D

Cases referred to

Fielding & Platt Ltd v Selim Najjar [1969] 1 WLR 357; [1969] 2 All ER 150 (refd)

Wheatland Investments Ltd v Sask Tel [1995] 1 WWR 671 (refd)

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Wong Fook Heng v Amixco Asia Pte Ltd [1992] 2 SLR 342 (refd)

Legislation referred to

Bills of Exchange Act 1949 ss 2, 29, 30(2), 31(2), 38, 47(2), 55, 73(1), (2), 75(a), 81

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Appeal from: Summons No 72-10249 of 1994 (Magistrate's Court, (Kuala Lumpur)

Yong Teck Fah (*Ong Gek Lin* with him) (*Yee Teck Fah & Co*) for the appellant.

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Shamsuddin bin Haji Nawawi) (*Shamsuddin & Co*) for the respondent.

Nik Hashim J: The Multihorizon Sdn Bhd ('the respondent'), on 19 February 1994 drew a crossed post-dated cheque HSBC No 401062 ('P2') in the sum of RM23,000 made payable to cash or bearer dated 23 February 1994 and delivered the cheque to Cipta Hikmat Development Sdn Bhd ('Cipta Hikmat') for the purchase of timber logs from the latter.

H As Cipta Hikmat was unable to supply the logs, the respondent countermanded the payment. In the meantime, the cheque fell into the hands of En Yee Teck Fah, counsel who argued this appeal before me on behalf of the appellant, who is his sister. Counsel negotiated the cheque with the appellant and obtained cash RM23,000 from her in return for the cheque. On 23 February 1984, the appellant presented the cheque for payment and it was dishonoured, having been countermanded by the respondent. The appellant brought an action against the respondent on the

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dishonoured cheque for the sum of RM23,000. The learned magistrate rejected the claim.

The learned magistrate in her judgment at p 19 of record said:

Di antara plaintif dan defendan, tiada sebarang hubungan dalam kontrak (no privity of contract). Defendan mengeluarkan cek kepada pihak lain dan tiada balasan (consideration) yang diterima dari plaintif. Malahan, plaintif dan defendan saling tidak kenal antara satu sama lain sehinggalah ke tarikh perbicaraan. Dasar 'holder' yang dibawa oleh plaintif sebaliknya adalah tidak munasabah. Walaupun ada nilai 'good faith' pada plaintif, beliau telah gagal untuk membuktikan kepada mahkamah mengenainya. Mengenai kenyataan plaintif bahawa defendan perlu memberi pampasan kepada plaintif (compensate), mahkamah tidak dapat menerimanya memandangkan tiada bukti bahawa dari tindakan defendanlah maka plaintif mengalami kerugian. Plaintif sepatutnya berpaling kepada adik beliau, En Yee Teck Fah bagi mendapatkan penjelasan dan pampasan tersebut dan bukan daripada defendan. Daripada keterangan kedua-dua saksi, dapat mahkamah simpulkan bahawa tiada niat buruk yang boleh dikesan dari pihak defendan terhadap plaintif. Cuma plaintif sendiri yang mencari risiko dengan menerima cek tersebut tanpa soal jawab.

The appellant appealed against that decision. Learned counsel for the appellant argued that the appellant was entitled to judgment against the respondent because she, being the holder of the cheque, had given good consideration for the cheque by giving cash to her brother in return for the cheque.

Learned counsel for the respondent, in opposing the appeal, contended that the appellant was a complete stranger to the respondent, and in the absence of any consideration, the appellant cannot recover the amount from the respondent. According to counsel, the cheque was meant for Cipta Hikmat as there was a contract between the two, and not for the appellant who was a fourth party to the cheque. As such, the learned magistrate was right to dismiss the appellant's claim.

The issue is simply whether a holder of a cash cheque who is not an immediate party to the cheque may enforce payment against the drawer of the cheque which has been countermanded.

The basic principles are clear. The countermand of a cheque by a drawer only affects the relationship between the drawer and his banker, namely it terminates the authority of the banker to make payment on the cheque (s 75(a)). A countermand, however, does not in any way affect the liability of the drawer towards a holder of the cheque (see *The Law of Negotiable Instruments* (4th Ed) by Poh Chu Chai (1998) at p 336; *Wheatland Investments Ltd v Sask Tel* [1995] 1 WWR 671). Section 2 defines 'holder' to mean the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

The cheque in the present case is a bill of exchange payable on demand, and thus, it is governed by the provisions of the Bills of Exchange Act 1949 ('the Act') (s 73(1) and (2)). The cheque made payable to cash, as is the case here, is negotiated by delivery (s 31(2)). The facts showed that the

- A** cheque was issued by the respondent who passed it to En Toh of Cipta Hikmat. The cheque did not bear on it the words 'Not Negotiable' (s 81) and thus, ipso facto it is a negotiable instrument. Strangely, this cheque fell into the hands of the appellant who claimed that she got it from his brother, who is the counsel before me. However, there is no evidence before the court as to how the counsel got hold of the cheque. He did not testify in court even though he was present during the trial before the learned magistrate. The respondent, however, did not allege any fraud or illegality being committed in respect of the cheque. So, in the absence of any such allegation, the court must presume that the appellant was the holder in due course (s 30(2)) who took the cheque complete and regular on the face of it.
- B**
- C** On record, there is no evidence when the appellant obtained the cheque from his brother. Presumably, she got it on 23 February 1994 or earlier because according to her testimony, she presented the cheque for payment on 23 February 1994 and the cheque was returned on 26 February 1994 with the endorsement 'Payment Stopped' stamped across the face of the cheque. It is therefore, clear from the evidence that she became the holder
- D** of the cheque before it was overdue and without notice of the countermand. Neither was there any evidence that at the time the cheque was negotiated to her, she had any notice of any defect in the title of her brother. Thus, in the absence of such notice, the appellant must have taken the cheque in good faith and for value (s 29).
- E** In the present case, there was no doubt that the cheque was complete and regular on its face. Since the cheque was dishonoured by payment, the immediate recourse against the drawer of the cheque, namely the respondent, accrues to the appellant, the holder (s 47(2)). Therefore, by virtue of s 38, the appellant, being a holder in due course, even though she was the fourth party, holds the cheque free from any defect of title of prior parties, as well as from mere personal defences available to the prior parties among themselves. In other words, defences touching on the cheque itself, for instance, a failure of consideration for the cheque cannot be raised against a holder in due course of the cheque, even though it might be raised in an action between the immediate parties (see the *Law of Negotiable Instruments* by Poh Chu Chai at p 231). The holder of a cash cheque holds the cheque free from all or any defects of title of prior parties even if he obtains it from a thief, provided that the holder obtains it in good faith without any notice of its defects. Accordingly therefore, the appellant was entitled to sue the respondent in her own name.
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- G**
- H** It is to be noted that the appellant and the respondent are not immediate parties to the cheque. Section 55 stipulates in effect that the drawer of a cheque, by drawing it, engages that upon due presentment it will be paid, and if it is dishonoured, he will compensate the holder. Thus, the respondent had no defence to the appellant's claim and the appellant was therefore entitled to judgment against the respondent.
- I** In the instant case, it is obvious from her decision that the learned magistrate had misdirected herself on the law of negotiable instruments and as a result, her findings are erroneous. She failed to appreciate that a cheque

is a negotiable instrument, once given, is to be treated as cash, and 'is to be honoured unless there is some good reason to the contrary' (per Lord Denning MR in *Fielding & Platt Ltd v Selim Najar* [1969] 1 WLR 357; [1969] 2 All ER 150; *Wong Fook Heng v Amixco Asia Pte Ltd* [1992] 2 SLR 342). In this case, I find there is no good reason to the contrary.

Consequently, the appeal is allowed and the decision of the learned magistrate be set aside. There will be judgment for the appellant on her claim for the sum of RM23,000 with costs, plus interest on the amount at 8% per annum calculated from the date of the summons, ie 23 April 1994 until the judgment is satisfied.

Appeal allowed.

Reported by Loo Lai Mee

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